

BEFORE THE
POSTAL RATE COMMISSION

RECEIVED

JUN 8 12 39 PM '99

POSTAL RATE COMMISSION
OFFICE OF THE SECRETARY

COMPLAINT ON POST E.C.S.

DOCKET NO. C99-1

COMMENTS OF UNITED PARCEL SERVICE
IN RESPONSE TO PRESIDING OFFICER'S
RULING NO. C99-1/2
(June 8, 1999)

In Ruling No. C99-1/2, the Presiding Officer directed the parties to (1) comment on the special rules proposed for this proceeding, (2) submit proposed language for protective conditions, and (3) discuss when less stringent or more stringent protective conditions might be appropriate. UPS's comments follow.

(1) The Special Rules of Practice Should
Be Adopted, With One Modification.

UPS suggests only one modification to the proposed rules: Rule 2(c) should be changed to require answers and objections to all discovery requests to be filed and served within seven days of service of the discovery request.

UPS's Complaint was filed on October 6, 1998. Thus, this proceeding is now more than eight months old. In the meantime, the Postal Service has been unilaterally providing, without Commission review, a competitive service that, UPS submits, is subject to Commission review. These circumstances counsel in favor of expedition.

That is why UPS proposed the now-approved date of July 27, 1999, for the filing of its direct case.

If UPS is to be able to meet its deadline consistent with due process, discovery must be conducted expeditiously. Given the Postal Service's blanket objection to all discovery requests to date, the rules should provide for more accelerated discovery responses -- whether answers or objections -- so that discovery disputes may be resolved and information furnished in time for UPS to use that information in its direct case.

(2) UPS's Proposed Protective Conditions
Should Be Approved, With Two Modifications.

In an effort to expedite discovery, when UPS's initial discovery was served, we proposed protective conditions and identified (even in the absence of any Postal Service objection) information UPS is willing to accept under those conditions. The Postal Service has responded with a complete refusal to provide any information -- even information it concedes is relevant -- and with proposed protective conditions that are excessively restrictive.

The premise of the Postal Service's position is that UPS is likely to subvert and misuse the Commission's complaint process for the purpose of competitive intelligence-gathering. It urges that extremely restrictive conditions should be imposed on complainant and its counsel and consultants alike. The Postal Service's approach is, to put it mildly, unwarranted.

The Postal Service's concern seems to be based on its view that "There is absolutely nothing in UPS's proposed provisions that shields [protected] information from those agents of UPS that advise UPS management on competitive matters."

United States Postal Service Response to Motion of United Parcel Service for a Protective Order (May 25, 1999) at 4. That is not so. Paragraph 6 of UPS's proposed conditions specifically provides that "All persons who obtain access to [protected] materials . . . are required to protect the materials . . . to prevent unauthorized disclosure of the materials"

Nevertheless, UPS proposes two modifications to its proposed conditions that should alleviate the Postal Service's concerns and eliminate any need for the overly broad limitations the Postal Service seeks.

First, UPS suggests that its proposed protective conditions include the following additional (already implicit) restriction: "Materials and information provided in response to Presiding Officer's Ruling No. C99-1/___ shall be used only for purposes of this proceeding, and shall not be used for any other purposes." UPS also proposes that, for purposes of this case, only UPS's counsel and consultants need be given access to protected materials.¹ Thus, paragraph 1(b) of UPS's proposed protective conditions would be changed to read: "Only those persons who are either: . . . (b) counsel to a participant in Postal Rate Commission Docket No. C99-1 or a witness or potential witness of such participant for purposes related to Docket C99-1 shall be granted access to [protected materials]." These two modifications, taken together, should eliminate the need for the overly broad provisions requested by the Postal Service,

1. UPS is able in this case to agree to exclude any of its employees from access to protected materials because of the unique nature of this proceeding and of the issues it raises. A similar restriction in future cases (such as general rate proceedings) would be unwarranted.

including the need for any provisions limiting access to individuals not "involved in competitive decisionmaking."²

The Postal Service's proposed protective conditions exceed the bounds of protective conditions typically used in civil litigation. In that context, the discovery of confidential information generally proceeds on the basis of undertakings by professional representatives of the parties to safeguard and limit access to and use of the information. The conditions urged by the Postal Service are extraordinarily excessive by those typical discovery standards. See, e.g., 8 Federal Practice and Procedure (Wright, Miller, & Marcus, 1994), at § 2035, pages 476-77; Manual for Complex Litigation (Third) (1997), at §§ 41.36, 41.37 (sample protective orders).

After all, the "commercial sensitivity" privilege that the Postal Service asserts is a qualified one. In fact, the increasing use of restrictive protective conditions in Commission proceedings runs counter to the trend in the courts of increasing rather than decreasing public access to information used in adversary proceedings. See 6 Moore's Federal Practice (3d ed. 1999) at § 26.105 [8]. See also Pansy v. Borough of Stroudsburg, 23 F.3d 772 (3d Cir. 1994).

-
2. Commission dockets proceeded without dispute insofar as the terms for protecting confidential information was concerned from 1970 until Docket No. R97-1, when, for the first time, the Postal Service proposed and the Presiding Officer accepted protective conditions adapted to a very different type of proceeding (bid protests before the General Accounting Office). Those conditions now seem to have taken on a life of their own, despite the absence of any indication of any difficulties under the simpler and more direct protective conditions that have served the Commission well for over 25 years.

On what terms confidential information should be protected must be decided by balancing the potential risk of disclosure against the need of the party seeking discovery to prosecute its case effectively. The public's interest in the proper resolution of disputes must also be considered, especially in the case of proceedings before the Commission, where the public interest is very much at issue. When a privilege against the production of competitively sensitive information is asserted, competing considerations must be balanced in determining what protective conditions should be imposed: the potential harm to the competitive position of the party asserting the privilege must be weighed against the strong public and private interests in favor of the complainant's right to (a) access to the evidence needed to prove its case, and (b) the effective assistance of counsel and consultants. The conditions requested by the Postal Service tip this balance unfairly in favor of the Postal Service.³

3. Indeed, the provisions urged on the Presiding Officer by the Postal Service, while drawn from General Accounting Office ("GAO") standards governing its protective orders in bid protests, is broader than the case law interpreting the GAO standards. See U.S. Steel Corp. v. United States, 730 F.2d 1465, 1468 n.3 (Fed. Cir. 1984) ("involvement in 'competitive decisionmaking'" is "serviceable . . . shorthand" for "counsel's advice and participation in" decisions on pricing, product design, etc.). Correctly understood, the GAO protective conditions do not preclude even in-house counsel from providing legal advice in connection with competitive decisionmaking, as long as counsel does not actually participate in making the competitive decision itself. See, e.g., id.; Matsushita Electronic Industrial Co., Ltd. v. United States, 929 F.2d 1577, 1580 (Fed. Cir. 1991); Baxter Travenol Laboratories, Inc. v. LeMay, 89 F.R. D. 410, 416-17 (S.D. Ohio 1981).

(3) Less Stringent and More Stringent Protective Conditions.

It is difficult to determine beforehand a bright line distinction between information deserving less stringent and that deserving more stringent protection. However, UPS suggests that purely Postal Service information requires less stringent protection than the information of third parties. As one court has said in a similar context, the Postal Service "is still a public agency," and it "is still subject to public responsibility . . . " National Western Life Insurance Co. v. United States, 512 F. Supp. 454, 462 (N.D. Tex. 1980). As a result, public access to its information should be more freely granted.

This distinction may in part underlie the more demanding provisions of GAO protective conditions in bid protest cases. In those cases, it is not only the interests of the contracting agency that are involved, but also the interests of a private third party in protecting its own information.

Using this as a basis, UPS suggests that there is no need in this case for "more stringent" protection. The only discovery requests that are candidates for more stringent protection under this approach would be some of the information requested in interrogatory 5(a) (solicitations to specific customers) and the information requested in interrogatories 5(f) (customer surveys), 10 (proposals, bids, and solicitations), and 14 (IPC - Postal Service contract). However, where UPS has requested information relating to third parties, UPS has specified that the identities of those parties need not

be indicated. That avoids any compromising of the information of third parties, thereby eliminating any concern they may have over the public disclosure of their information.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "John E. McKeever", is written over a horizontal line.

John E. McKeever
Kenneth G. Starling
Nicole P. Kangas
Attorneys for United Parcel Service

PIPER & MARBURY L.L.P.
3400 Two Logan Square
18th and Arch Streets
Philadelphia, PA 19103
(215) 656-3300

and

1200 19th Street, N.W.
Washington, DC 20036
(202) 861-3900

Of Counsel

CERTIFICATE OF SERVICE

I hereby certify that on this date I have caused to be served the foregoing document on all parties to this proceeding by first class mail, postage prepaid, in accordance with Section 12 of the Rules of Practice.

Nicole P. Kangas
Nicole P. Kangas

Dated: June 8, 1999
Philadelphia, PA